

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

BARBARA KNAPKE, individually and on
behalf of all other similarly situated,

Plaintiff,

v.

PEOPLECONNECT, INC., a Delaware
Corporation,

Defendant.

NO. 2:21-cv-00262-MJP

DEFENDANT PEOPLECONNECT,
INC.'S REPLY IN SUPPORT OF
MOTION TO STAY PROCEEDINGS
PENDING APPEAL OF COURT'S
DECISION TO DENY DEFENDANT'S
MOTION TO COMPEL ARBITRATION

NOTED ON MOTION CALENDAR:
Friday, September 17, 2021

DEFENDANT PEOPLECONNECT, INC.'S REPLY IN
SUPPORT OF MOTION TO STAY PROCEEDINGS
PENDING APPEAL OF COURT'S DECISION TO DENY
DEFENDANT'S MOTION TO COMPEL ARBITRATION
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PeopleConnect showed in its Motion that a stay pending appeal of the Court’s denial of the motion to compel arbitration is appropriate under established law in this District. Plaintiff does not address, let alone distinguish, that caselaw. Because Plaintiff is thus able to respond only with out-of-district cases that conflict with the relevant precedent, the Motion should be granted.

I. PEOPLECONNECT IS LIKELY TO SUCCEED ON THE MERITS OF ITS APPEAL

As explained in PeopleConnect’s Motion to support a stay, a moving party may either “(1) show[] a probability of success on the merits and the possibility of irreparable injury; or (2) demonstrate[e] that serious legal questions are raised and that the balance of hardships tips sharply in its favor.” Mot. 2 (citing *Lowden v. T-Mobile USA, Inc.*, No. C05-1482P, 2006 WL 1896678, at *1 (W.D. Wash. July 10, 2006)). PeopleConnect has shown both.

A. PeopleConnect Can Make A “Strong Showing” On The Merits.

PeopleConnect can make a strong showing on the merits because this Court did not address whether Plaintiff’s attorney-agent had *implied* actual authority to enter into the arbitration agreement on her behalf. Dkt. No. 28 (“Mot.”) at 3.¹ Plaintiff admits the premise to this argument—that under Ohio law, a principal can “impliedly confer[]” actual authority on her agent to enter into an arbitration agreement. Dkt. No. 34 (“Resp.”) at 2. And she does not deny that in Ohio, “[u]nless its extent is *expressly limited* by the principal, implied [actual] authority is that authority which is incidental and necessary for the agent to carry into effect the powers expressly conferred upon him.” *Kaplan Trucking Co. v. Grizzly Falls Inc.*, 86 N.E.3d 845, 853 (Oh. Ct. App. 2017) (citation omitted). But Plaintiff then focuses on the wrong fact—whether she told her attorney he *could* enter into an arbitration agreement on her behalf. Resp. 3. Unless Plaintiff told her attorney he *could not* agree to arbitrate, which she has not alleged, Plaintiff impliedly conferred authority on her attorney to take all actions “incidental and necessary to” filing the Complaint.

¹ Plaintiff does not address why Ohio law applies to this dispute, nor does she identify a conflict between Ohio and Washington law. See Mot. at 3 n.3 (arguing that Washington law applies because there is no conflict).

Kaplan Trucking Co., 86 N.E. 3d at 853. That authority includes accessing Classmates.com and agreeing to the TOS.

Regarding Plaintiff's implied ratification, which this Court also did not address, Plaintiff argues she did not have the requisite actual knowledge to ratify her attorney-agent's actions because her attorney-agent "had no discussion with Plaintiff about creating an account on Defendant's website."² Resp. 4. This misses the point. Plaintiff need not have actual knowledge *before* her attorney-agent agreed to the arbitration agreement because ratification, by definition, occurs after-the-fact. *See Campbell v. Hosp. Motor Inns, Inc.*, 24 Ohio St. 3d 54, 59 (Ohio 1986). Plaintiff has been aware of the arbitration agreement since at least May 3, 2021, when PeopleConnect filed its Motion to Dismiss. Dkt. 13. Since then, Plaintiff has accepted and retained the benefit of the arbitration agreement by not withdrawing the Complaint.

B. PeopleConnect's Appeal Presents A Serious Legal Question.

"[A] question is serious when it raises an issue of first impression within the Ninth Circuit or involves a split in legal authority." *Wilson v. Huuuge, Inc.*, No. 3:18-cv-05276-RBL, 2019 WL 998319, at *2, *5 (W.D. Wash. Mar. 1, 2019) (emphasis added) (internal citation omitted) (granting motion to stay). Both are true of this case. Mot. 5–6.

First, Plaintiff argues there is no issue of first impression because contract law is "well-defined." Resp. 5. While principles of contract law may be well-defined, the arbitration issue presented here is not. Plaintiff has not identified any case addressing whether and when, under Ohio or Washington law, an attorney can have implied actual authority to enter into an arbitration agreement on behalf of his client. Plaintiff all but acknowledges that "well-defined" contract law does not resolve this, as she heavily argues that Rule 11 shapes this analysis. Resp. 3.³ So contract

² Plaintiff's contention that PeopleConnect waived this argument because it was not in the Motion to Dismiss is without merit. Plaintiff raised lack of ratification in her Response so PeopleConnect was permitted to address in its Reply. Dkt. 19 at 2. Plaintiff relies on *Lukis v. Whitepages Inc.* Resp. 3. But *Lukis* involves a party's waiver of the right to arbitrate its claim, which is clearly not applicable here. *Lukis v. Whitepages Inc.*, 2021 WL 1600194, at *8.

³ This is a red herring. Even if Rule 11 required Plaintiff's attorney-agent to investigate the website, he merely needed to opt-out of the arbitration agreement. Mot. 3.

1 and agency law may be informative, but they do not “squarely address the specific issue” in this
 2 case, which is novel. *Wilson*, 2019 WL 998319, at *3. Moreover, the Court’s decision raises a
 3 novel FAA preemption issue. If Ohio law prevents attorneys from agreeing to arbitration
 4 agreements on behalf of their clients without express authorization, even though implied
 5 authorization suffices for other types of contracts, then that aspect of Ohio law runs afoul of the
 6 Supreme Court’s holding that state law contract “defenses that apply only to arbitration or that
 7 derive their meaning from the fact that an agreement to arbitrate is at issue” are preempted. *AT&T*
 8 *Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). So if it is accurate that Ohio law creates a
 9 special exception to ordinary contract principles merely because the underlying agreement is one
 10 to arbitrate, federal law precludes the defense. The Ninth Circuit has not yet considered this
 11 question either.

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 13 *Second*, Plaintiff argues there can be no split in authority because *Callahan*, *Uber*, and *Hui*
 14 *Ma* all involve California law. Resp. 6. The problem with this argument is that Plaintiff has not
 15 identified law in *any* other state that addresses this issue.⁴ So there is a split in authority in the *only*
 16 *cases* Plaintiff identified—*Uber* and *Hui Ma* allow for this; *Callahan* does not. Plaintiff then
 17 contends there is no split because *Uber* is distinguishable. Resp. 6. Initially, this ignores that *Hui*
 18 *Ma* also conflicts with *Callahan*. *Uber* is not distinguishable in any event. The court found the “the
 19 central inquiry is whether [plaintiffs’ agent] was acting within the scope of the agency when she
 20 tested the Uber App.” *Ind. Living Res. Ctr S.F. v. Uber Techs, Inc.*, 18-cv-06503-RS, 2019 WL
 21 3430656, at *4 (N.D. Cal. July 30, 2019). The court explained “a plaintiff who dispatches an agent
 22 to deal with a defendant on his or her behalf is bound by an arbitration agreement entered into by
 23 the agent in the course of those dealings.” *Id.* at *3. Plaintiff emphasizes she did not give her
 24 attorney-agent express authority to agree to the arbitration provision. Resp. 4. But as in *Uber*,

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 45 ⁴ Plaintiff alleges PeopleConnect “never cited or analyzed” *Hui Ma*, but this point appeared in its Reply. Dkt. 19 at 2.

1 Plaintiff's attorney-agent agreed to the arbitration agreement "in the course of" approved conduct
 2 (drafting the Complaint). So the cases are not distinguishable. They conflict.
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4 *Third*, Plaintiff relies on *Joseph v. Trueblue, Inc.*, No. C14-5963, 2015 WL 9487965, at *2
 5 (W.D. Wash. Aug. 19, 2015), to argue there is no split in authority because "Washington law is
 6 well settled on the issue of enforceability of a non-signatories' rights to enforce arbitration
 7 agreements." Resp. 6. This case is inapposite as PeopleConnect, a signatory to the agreement, is
 8 seeking to enforce it. And, Washington law is clear that: "Arbitration agreements may encompass
 9 nonsignatories under contract and agency principles." *Romney v. Franciscan Med. Grp.*, 349 P.3d
 10 32, 42 (Wash. Ct. App. 2015).⁵ *Joseph* is further distinguishable because there, the court did not
 11 deny the motion to compel arbitration on agency principles, but because it found that the defendant
 12 could not use principles of equitable estoppel to enforce an arbitration agreement. 2015 WL
 13 575289, at *2. Plaintiff's reliance on *Wallace v. AmSurg Holdings, Inc.*, 2015 WL 7568592, at *5
 14 (D. Or. Nov. 24, 2015), also is unpersuasive, as it conflicts with Washington and Ohio law.
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23 **II. PEOPLECONNECT WILL SUFFER IRREPARABLE HARM ABSENT A STAY**

24 PeopleConnect would suffer irreparable harm absent a stay because it would be forced to
 25 litigate a claim in federal court which may belong in arbitration and that litigation would include
 26 costly discovery broader in scope than the discovery permitted by the AAA. Mot. 6. Plaintiff cites
 27 *Britton v. Co-op Banking Grp.*, 916 F.2d 1405, 1410 (9th Cir. 1990), to argue that PeopleConnect
 28 will not be harmed if this Court decides this case on its merits before the Ninth Circuit has a chance
 29 to decide the appeal. Resp. 7. But *Britton* does not address this issue; it holds that a party has
 30 Article III standing to bring an appeal based on an arbitration agreement even if the district court
 31 already resolved the dispute on its merits. *Id.* at 1410. Regardless of Article III standing, the
 32 problem here is that if this Court resolves this dispute on its merits, as Plaintiff implies is proper,
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⁵ Ohio is the same. *Javitch v. Prud. Sec., Inc.*, No. 02 CV 7072, 2011 WL 251099, at *4, *8 (N.D. Ohio Jan. 25, 2011).

1 and the Ninth Circuit decides this case belonged in arbitration, PeopleConnect’s right to arbitrate
 2 this dispute will be “rendered meaningless.” *Wilson*, 2019 WL 998319, at *4.
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4 Unable to distinguish the on-point, in-district authority PeopleConnect cited (Mot. 6–7),
 5 Plaintiff relies on out-of-district authority to argue litigation costs cannot constitute irreparable
 6 harm. Resp. 8. First, litigation costs are just one way PeopleConnect will be irreparably harmed if
 7 forced to litigate a class action in court when it should be an individual claim resolved in private
 8 arbitration. Mot. 6; *see Wilson*, 2019 WL 998319, at *4. Moreover, the rule in this District is
 9 clear—the cost of discovery in a case that may belong in arbitration can constitute irreparable
 10 harm. *Lowden*, 2006 WL 1896678, at *2; *B.F. v. Amazon.com Inc.*, No. C19-910-RAJ-MLP, 2020
 11 WL 3548010, at *4 (W.D. Wash. May 15, 2020). Plaintiff does not address these cases.
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13 Plaintiff also does not address PeopleConnect’s argument about the difference in *scope*
 14 between discovery in federal court and in arbitration, effectively conceding discovery in federal
 15 court will be more costly and invasive than discovery in arbitration. Resp. 8. Instead, Plaintiff
 16 argues there is “near total overlap between the factual basis of Plaintiff’s individual claims and the
 17 factual basis for the putative class.” *Id.* But it is “undisputed that in a putative class action, as is
 18 the case here, the burdens of discovery ‘are *substantially greater* than in an individual arbitration.’”
 19 *Waithaka. v. Amazon.com, Inc.*, No. C19-01320-RSM, 2020 WL 7028945, at *6 (W.D. Wash.
 20 Nov. 30, 2020) (emphasis added) (citation omitted). Moreover, Plaintiff cites no case where a court
 21 has found no irreparable harm because there is an overlap in discovery. Allowing discovery
 22 because of a supposed “near total overlap” in factual issues would create an exception that would
 23 apply to every class action that may belong in arbitration. *See B.F.*, 2020 WL 3548010, at *4
 24 (finding class action discovery would irreparably harm defendant).
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26 **A. A Stay Will Not Harm Plaintiff.**

27 Plaintiff insists she will suffer “ongoing” harm until this Court grants an injunction because
 28 a stay will allow PeopleConnect to “persist” in allegedly “illegal conduct” and that a stay will
 29 “increase the risk of lost evidence.” Resp. 9. The argument is without merit. PeopleConnect
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1 already has suppressed Plaintiff's image from Classmates.com, so there can be no "ongoing harm".
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 3 Mot. 7. The only harm Plaintiff can point to is potential litigation delay. But courts here routinely
 4 find that a delay in proceedings alone does not outweigh irreparable harm to a defendant. *E.g.*,
 5 *B.F.*, 2020 WL 3548010, at *5; *Aegean Marine Petroleum S.A. v. Canpotex Shipping Servs. Ltd.*,
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 7 No. 2:15-CV-00172-RAJ, 2016 WL 898571, at *3 (W.D. Wash. Mar. 9, 2016). Further, there is
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 9 no risk of lost evidence. PeopleConnect has a robust litigation hold in place. Mot. 7–8. And
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 11 Plaintiff's generic assertion of potential lost evidence is insufficient. *See Rajagopalan v.*
 12 *Noteworld, LLC*, No. C11-5574, 2012 WL 2115482, at *4 (W.D. Wash. June 11, 2012). Plaintiff
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 14 has not demonstrated any specific harm she will suffer if this Court grants a stay.
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16 **B. A Stay Is In The Public Interest.**

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 18 Plaintiff does not address, and thus concedes, that litigating a case which may belong in
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 20 arbitration will force the Court to unnecessarily "expend its time and energy"—a public-interest
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 22 factor favoring a stay. Mot. 8 (citing *Lowden*, 2006 WL 1896678, at *2). Plaintiff contends a stay
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 24 still is contrary to the public interest because Ohio has a "substantial public interest in protecting
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 26 its citizens from unauthorized use of their photographs." Resp. 9. PeopleConnect does not dispute
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 28 Ohio has a public interest in enforcing its laws, but that public interest does not depend on the
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 30 forum in which those state-law claims are adjudicated. *See* Mot. 8 (citing *Moses H. Cone Mem'l*
 31 *Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983)). Plaintiff's position—that the public
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 33 interest requires that this Court resolve this dispute immediately, even if this case ultimately still
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 35 could be arbitrated—is at odds with the "liberal federal policy favoring arbitration" *Epic Sys. Corp.*
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 37 *v. Lewis*, 138 S. Ct. 1612, 1621 (2018) (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24).
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39 **III. CONCLUSION**

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 41 For the reasons set forth above and in the Motion to Stay, the Court should stay proceedings
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 43 in this case pending resolution of the appeal of its decision denying PeopleConnect's motion to
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 45 compel arbitration.

1 Dated this 17th day of September, 2021.

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